U.S. Department of Homeland Security
20 Massachusetts Avenue, NW, Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 189 51335 Office: TEXAS SERVICE CENTER Date: OCT 08 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a general contractor/major construction company that seeks to employ the beneficiaries as construction workers. The petitioner endeavors to classify the beneficiaries as nonimmigrant workers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The certifying officer of the Department of Labor (DOL) declined to issue a labor certification because the petitioner did not establish a temporary need for 50 workers. The officer determined that there was a year-round need for the workers. The director determined that the petitioner had not submitted sufficient countervailing evidence to overcome the findings of the Department of Labor.

Upon notice of certification, neither counsel nor the petitioner submitted any additional evidence. The record is complete.

Section 101(a)(15)(H)(ii)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker as:

> an alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . . .

The regulations further describe an H-2B nonagricultural temporary worker as an alien who is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers. 8 C.F.R. § 214.2(h)(6)(i).

Temporary service or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary. 8 C.F.R. § 214.2(h)(6)(ii)(A).

The test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B).

The petitioner indicates on the Form I-129 that the employment is peakload. To establish that the nature of the need is "peakload," the petitioner must demonstrate that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the

place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA-750) reads:

> Any one or combination of the following duties on construction projects: Measuring distances from grate stakes, drive stakes, stretches tightline, bolts, nails, lines, and rocks under forms; participates in the proper use of machinery to conform to grade specifications, transports and levels earth to grade specifications, using hand tools, mixes concrete in a portable miser, [sic] smoothes and finishes freshly poured concrete and cement using appropriate tools; positions, joins, and seals pipe sections; erects scaffolding, shoring, and braces; mixes and applies paints or other compounds over surfaces; sprays material such as water, sand, steam, vinyl, paint, or stucco through a hose to clean or seal surfaces; applies caulking; grinds and polishes surfaces; and perform other tasks involving dexterous duties using hands and tools which may involve but not limited to demolishing buildings, sawing lumber, dismounting forms, removing projections from concrete, mounting pipe hangers, and attaching insulating material.

The DOL stated that the petitioner's business is "similar to a 'temporary staffing agency' and in the business of supplying the labor needs of one or more customers." The director reiterated this statement. The AAO finds that, while this language is somewhat confusing, the DOL is not stating that the petitioner is a staffing agency, but that its work is similar, in that there is an ongoing need for workers, since after the current contract is completed, there will be future contracts.[1]

The petitioner submitted an amended contract stating that the original one-year contract period was being extended to approximately two years. The regulations state that the general rule to qualify for an H-2B classification is that "the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year." 8 C.F.R. § 214.2(h)(6)(ii)(B). The petitioner did not provide any evidence to establish that extraordinary circumstances existed to justify a period of stay of longer than one year for the beneficiaries.

The petitioner has not established that it has a peakload need for the beneficiaries. As stated above, the regulations require the petitioner to demonstrate that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. While the petitioner stated in its May 30, 2002 letter in support of its petition that it normally employs 130-150 people, it provides no corroborating evidence to support this claim, nor any evidence to establish how many of these employees are construction

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[1] U.S. Department of Labor Field Memorandum No. 25-98, dated April 27, 1998, states: "The existence of a single short term contract in an industry such as construction does not, by itself, document temporary need if the nature of the industry is for long term projects which may have many individual contracts for portions of the overall project."

workers or laborers. Finally, the petitioner has not established that the beneficiaries will not become part of its regular operation.

The DOL and the director have stated that the nature of the petitioner's work in this case is such that the positions are permanent rather than temporary. The AAO concurs.

Based upon the above discussion, the petitioner has not established eligibility of the beneficiary construction workers for H-2B classification. Accordingly, the director's decision will not be disturbed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's July 31, 2002 decision is affirmed. The petition is denied.